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2011-2012 CASES FROMTHE PROSECUTION PERSPECTIVE

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CASES FROM THE PROSECUTION PERSPECTIVE 2011-12

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SCOTUS DECISIONS

- BOBBY *v.* DIXON
- MESSERSCHMIDT ET AL. v. MILLENDER
- HOWES v. FIELDS
- PERRY v. NEW HAMPSHIRE
- UNITED STATES v. JONES

AZ DECISIONS

- State v. Hummons
- Rivera-Longoria v. Slayton
- State v. Dixon
- State v. Britton
- State v. Lehr
- Brewer v. Rees
- State v. Lee

WARNING!

- Be cautious relying on federal habeas and section 1983 decisions for constitutional analysis
- They have overarching issues that may mislead you into believing that a black letter constitutional decision was reached.
- Federal habeas and 1983 published decisions may resolve the case, but not reach any constitutional decision.

WARNING!

- Habeas – AEDPA requires a showing of a state court ruling that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."
- Qualified Immunity for 1983 claims– "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
- NOTE: both issues can be resolved without resolving a constitutional question!

BOBBY V. DIXON, WHAT HAPPENED?

- Dixon and accomplice killed victim and buried him.
- On 11/4/93, Dixon was visiting police station. Officer Mirandized him, asked him about the murder, and Dixon refused to speak without an attorney.
- On 11/9/93, police arrest Dixon for forgery involving the victim's car and question him without Mirandizing him.
- Next day, Dixon learns police found the body. Says that he spoke with his attorney and wants to talk. Officers Mirandize him, and he confesses.

BOBBY *V.* DIXON

- "First, according to the Sixth Circuit, the *Miranda* decision itself clearly established that police could not speak to Dixon on November 9, because on November 4 Dixon had refused to speak to police without his lawyer. That is plainly wrong."
- Outside of custodial interrogation, a person cannot anticipatorily invoke *Miranda* rights.

BOBBY *V.* DIXON

- "Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground."
- *Note the Habeas holding: the Court is finding the lack of any precedent for the Court of Appeals holding.

BOBBY V. DIXON

- Court held that latter confession was not part of a two-step approach violating *Miranda*.
- A two-step approach makes *Miranda* warnings meaningless based on unique facts identified in *Missouri v. Seibert*, 542 U. S. 600 (2004):
  - The two confessions are near identical in substance,
  - The two conversations are close enough to form a continuum,
  - The earlier confession is used as leverage to induce the second confession.

BOBBY V. DIXON

- So, why is this not a two-step interrogation?
  - One, Defendant did not confess the first time, he denied the murder but admitted a forgery.
  - Two, no evidence that police used earlier confession to induce the second,
  - Three, hours passed between the conversations,
  - Four, circumstances changed. Dixon caught on to the investigation and claimed to have consulted his attorney

MESSERSCHMIDT ET AL. V. MILLENDER

- Using an illegal shotgun, Bowen tried to kill his ex-girlfriend as she fled from him. He threatened that he would kill her. He was a documented crip. Officers discovered his residence (Millender's) and confirmed several violent and firearm-related arrests.
- Officers obtained a search warrant for: all firearms and ammunition, as well as evidence indicating gang membership.

MESSERSCHMIDT ET AL. V. MILLENDER

- Affidavits and search warrant reviewed by:
  - Supervisors
  - Deputy district attorney
- Search warrant authorized by a neutral magistrate.
- So, wait, why are we discussing this?

MESSERSCHMIDT ET AL. V. MILLENDER

- Millenders filed a federal civil suit (1983 Action) alleging a fourth amendment violation, specifically:
- They alleged that warrant was overbroad because officers were responding to a domestic violence assault involving one shotgun, thus:
- Overbroad to seek **all firearms**
- Overbroad to seek **gang-related items.**

MESSERSCHMIDT ET AL. V. MILLENDER

- **Issue Warning!**
- "Whether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide."
- But, the Court did provide us a definition of what probable cause is.

WHAT IS PROBABLE CAUSE?

- "The Fourth Amendment does not require probable cause to believe evidence will conclusively establish a fact before permitting a search, but only "probable cause . . . to believe the evidence sought will aid in a particular apprehension or conviction."

MESSERSCHMIDT ET AL. V. MILLENDER

- So, what did probable cause pertain to?
  - given one illegal shotgun, assault, and gang membership, not unreasonable to believe probable cause existed for other illegal guns.
  - Not unreasonable to believe seizure needed to prevent further assaults.
- Note: issues of unreasonableness are immunity issues, not a constitutional issue.

MESSERSCHMIDT ET AL. V. MILLENDER

- So, what did probable cause pertain to?
  - "Gang affiliation would prove helpful in prosecuting him for the attack on Kelly"
  - Evidence could be used for impeachment,
  - Evidence could be used to rebut defenses,
  - "an effective means of demonstrating Bowen's control over the premises or his connection to evidence found there."

HOWES V. FIELDS

- Fields escorted from cell to conference room and questioned about conduct outside prison.
- Not *Mirandized* or advised that he did not need to talk.
- Fields was questioned for between five and seven hours; Fields was told more than once that he was free to leave and return to his cell;
- the deputies were armed,
- Fields remained free of restraints;
- the conference room door was sometimes open and sometimes shut; several times during the interview Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell;
- Fields confessed.

HOWES V. FIELDS

- The Habeas holding:
- In sum, our decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison.

HOWES V. FIELDS

- The Constitutional holding, part 1:
- "[I]mprisonment alone is not enough to create a custodial situation within the meaning of *Miranda.*"

WHY?

- First, questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.
- Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release.
- Third, a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.

HOWES V. FIELDS

- The Constitutional holding, part 2:
- Removal to a private setting and questioning about conduct outside prison do not create custodial interrogation.
  - Questioning prisoner in private does not remove her from a supportive atmosphere
  - Subject-matter of questioning has no greater potential for coercion.

PERRY V. NEW HAMPSHIRE

- Around 3 a.m. – officers receive call reporting a man trying to break into cars.
- Officers arrive and detain defendant.
- They contact apartment resident to describe the man.
- "Blandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer."

PERRY V. NEW HAMPSHIRE

- Perry moved to suppress admission of the identification as a due process violation.
- Perry argued the potential problems with the identification warranted suppression.
- Court held due process violation required showing of two things:
  - Unduly suggestive procedure employed by the police, and
  - Resulting unreliable identification.

PERRY V. NEW HAMPSHIRE

- "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."

UNITED STATES V. JONES

- Calm down people!
- The Court said very little:
- Said only, only, that affixing the device and use to monitor movements qualified as a "search."
- What did the Court not say:

UNITED STATES V. JONES

- Do we have something new?
- Maybe.
- Holding: A search may occur based on commission of a trespass as reflected by the common law at the time of fourth amendment adoption.
- Holding: Majority holds that Katz formulation is not controlling. Trespass is.

UNITED STATES V. JONES

- Okay, freak out.
- Do we have a future majority?
- Dissent:
- Case should be analyzed based on a reasonable expectation of privacy ground.
- Technological changes can make the concept of reasonableness difficult. And, common usage of technology will change that analysis.
- Society's expectation is that law enforcement could not engage in this monitoring (note that Court is substituting its expectation for society).

FOURTH AMENDMENT POINTERS

- Don't forget the other issues:
- The proponent of a motion to suppress has the burden of establishing that his Fourth Amendment rights were violated by the challenged search or seizure. State v. Harris, 131 Ariz. 488, 490, 642 P.2d 485, 487 (App. 1982).
- Before any burden on the State to justify a search or seizure arises, it is Defendant's burden to present evidence of an unreasonable search and/or seizure. Ariz. R. Crim. P. 16.2; *State v. Fimbres*, 152 Ariz. 440, 442, 733 P.2d 637, 639 (App. 1986).
- Neither a motion nor arguments of counsel qualify as evidence in support of the burden of production for a motion to suppress. *Fimbres*, 152 Ariz. at 442, 733 P.2d at 639.

FOURTH AMENDMENT POINTERS

- A request for suppression or even a suppression hearing, requires a number of showings before any burden shifts to the State.
- The first is a showing of a personal privacy interest in the invaded area. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).
- The second is a showing that the privacy interest is one that society as a whole objectively considers reasonable. *Id.*
- Third is a prima facie showing that the search or seizure was unreasonable.
- Fourth is that there is at minimum, a "but for" link between the state action and obtaining the evidence. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006).
- Fifth, is that the police action is of the type requiring deterrence. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

STATE V. HUMMONS

- Hummons was in disheveled clothing walking down the street with a very new, clean weed trimmer. He said that he was working. The officer took five to ten minutes to conduct a warrants check. She intended to merely tell him about his misdemeanor warrant, but arrested him when he began yelling and screaming. He had drugs on his person.
- COA held: any taint from alleged illegal detention was purged. No suppression.

STATE V. HUMMONS

- Wait, haven't we discussed this before?
- Yes, the court of appeals issued that opinion in 2010.
- COA assumed an unlawful detention, but found taint of detention purged.
- Why was the taint purged?
  - Temporal proximity – 5 to 10 minutes was not long
  - Flagrancy – finding of no constitutional violation by a trial court ameliorates a claim of flagrancy
  - Intervening circumstance – the arrest warrant is nonconcerning intervening circumstance that by itself authorized the obtaining of the evidence
- But, the Arizona Supreme Court was interested.
- So, what's the change?

STATE V. HUMMONS

- COA: Found the most important factor for analysis to be the discovery of a warrant.
- ASC: "We therefore hold that the subsequent discovery of a warrant is of minimal importance in attenuating the taint from an illegal detention upon evidence discovered during a search incident to an arrest on the warrant."

STATE V. HUMMONS

- According to the ASC, most important factor for purging taint is the purpose and flagrancy of the alleged illegal conduct.
- Here, any taint is purged:
  - No pattern of misconduct by officer,
  - Started as consensual encounter,
  - Officer was going to let Hummons go despite the warrant.

RIVERA-LONGORIA

- DISCLOSURE ALERT!
- I was on the moot court for this case
- I have litigated the constitutionality and lawfulness of Rule 15.8 before.

RIVERA-LONGORIA

- What are the constitutional issues?
  - Does Rule 15.8 violate the separation of powers clause?
- Answer:
  - No.

RIVERA-LONGORIA

- Is a constitutional challenge to Rule 15.8 dead?
  - Issue: Could the ASC lawfully enact Rule 15.8?
  - They do not list the issue, they do, however, include the line:
- "But a defendant's federal rights do not delimit this Court's power to adopt procedural rules governing disclosure in criminal cases."

RIVERA-LONGORIA

- Do federal constitutional rights delimit the Court's rulemaking authority?
- "A change in the substantive law can only be given or denied by [the] constitution or the legislature of [this] state." *State v. Fletcher*, 149 Ariz. 187, 192, 717 P.2d 866, 871 (1986).
- "The legislature makes substantive law." *State v. Superior Court (Velasco)*, 154 Ariz. 574, 576, 744 P.2d 675, 677 (1987) (same).
- "Matters of substantive law, however, are controlled by statute or constitutional law." *Pima County v. Hogan*, 197 Ariz. 138, 140, 3 P.3d 1058, 1060 (App. 1999).
- "The Rules of Evidence, however, are intended to guide Arizona courts in evidentiary matters, not to establish substantive rights in Arizona." *State v. Buonafede*, 168 Ariz. 444, 447, 814 P.2d 1381, 1384 (1991).

RIVERA-LONGORIA

- What can you do?
- Stop putting deadlines on plea offers.
- "Although a defendant no longer can accept an offer once it is withdrawn, we do not agree that withdrawing an offer without an express deadline is the same as imposing a deadline."
- Argue strenuously that the rule is substantive. It grants defendants the ability to sabotage criminal trials if the State does not exercise its discretion to their liking. That is not a procedural matter or trigger.

STATE V. BRITTON

- Britton parked in a disabled-only parking spot in the private parking lot of a pharmacy.
- Officer approached as she exited, blocking her car from exiting the space.
- When officer approached Britton, she showed signs of intoxication.
- Britton moved to suppress the evidence of her DUI based on a lack of authority for the officer to conduct the stop.

STATE V. BRITTON

- Holding 1: police do have authority to stop a vehicle for violation of a parking ordinance.
- Holding 2: traffic laws may be enforced outside public highways.
- Holding 3: A.R.S. section 9-462.01(A)(4) authorizes cities to establish requirements for off-street parking. Thus, cities are expressly authorized to apply ordinances to private parking lots.

STATE V. LEE (FRANKLIN)

- April 2009 – civil forfeiture action filed against the Franklins
- December 2009- an Indictment issues charging fraud schemes, theft, forgery, etc.
- Franklins seek depositions in the civil case of identified victims in the criminal case.
- The victims challenge by special action the trial court order denying their request for protective order against the depositions.

STATE V. LEE (FRANKLIN)

- Issue: Does Ariz. Const. Art 2, section 2.1 allow a victim to refuse a deposition by the defendant in a civil action?
- Holding:

1. The limitation in the Constitution is only to the identity of the person seeking the deposition, the defendant.
2. The Constitution does not limit the right based on the type of proceeding.
3. The limitation exists so long as the criminal proceeding continues.

STATE V. DIXON

- In 1978, Dixon raped and killed a woman.
- Investigations at the time failed to produce a match to the semen deposits left at the scene.
- In 2001, the State is able to match the semen to his profile in a database.
- Dixon represented himself at trial, while wearing a stun belt and a leg brace.
- Dixon requested that his advisory counsel cross-examine the DNA analyst.

STATE V. DIXON

- First, Dixon challenged the use of a stun belt and a leg brace.
- Blackletter rule: court must make specific findings of need before visible restraints may be ordered.
- Holding: no record of visibility supported challenge. Record reflected efforts to hide brace. Judicial notice that leg braces are not treated as visible.

STATE V. DIXON

- New medical examiner testified to conclusions reached from review of 1978 autopsy report.
- Dixon challenged testimony as violation of the Confrontation Clause.
- Holding: testimony of conclusions from review of data does not admit hearsay.
- Missed one: ASC refused to rule that an autopsy report is testimonial hearsay. They simply assumed so arguendo.
- But: this issue is before SCOTUS this term, so stay tuned.

STATE V. DIXON

- Dixon requested the trial court allow his advisory counsel cross-examine an expert witness. The trial court refused to do so unless Dixon ended his self-representation.
- Blackletter rule: there is no legal bar to hybrid representation. Rather, there is no legal right to hybrid representation.
- Blackletter rule: Switching back and forth is considered an untimely request to self-represent.

STATE V. LEHR

- 1991, Lehr kidnapped and sexually assaulted women, "brutally" killing three of them.
- 1992, DNA testing consumed the cotton swabs and was inconclusive.
- 2002, the prosecutor authorized testing the sticks, which consumed them. Defense counsel was not consulted. DNA extracted from the sticks was retained and made available for defense testing.

STATE V. LEHR

- Objection: State authorized testing that consumed the sticks without consulting the defense attorney.
- Arizona Supreme Court identified two due process claims for destruction of evidence.
- One, destruction of materially exculpatory evidence, and
- Two, destruction of potentially useful evidence.

STATE V. LEHR

- Destruction of materially exculpatory evidence:
  - One, the evidence is destroyed,
  - Two, the evidence had exculpatory value apparent before destruction,
  - Three, nature of the evidence that defendant cannot obtain comparable evidence by reasonably available means.

STATE V. LEHR

- Destruction of potentially useful evidence:
  - One, the evidence is destroyed,
  - Two, the evidence is potentially useful, and
  - Three, the destruction resulted from bad faith by the police.
- Did Lehr make these showings?
- Without explanation, ASC held that issue before the court was third prong (bad faith).

STATE V. LEHR

- Practice Pointers:
- Do not jump to the third prong,
- Control the issue of what the evidence is.
- Was the evidence destroyed? The DNA extraction was available for testing.
- Speculation should not qualify to make a claim of "potentially useful," especially when the results of the evidence are known.
- Remember, you are authorized to comment on a defendant's failure to do available testing.

BREWER V. REES

- March, 2010. Brewer enters TASC for deferred prosecution for drug charges occurring in 2009. Prosecution is suspended and Brewer is released on his own recognizance.
- November 2010. Brewer commits two new drug offenses.
- December 2010. State reinstates the 2009 charges.
- 2011. Arraignment for November offenses. Court holds Brewer without bond based on commission of new felony (2010 charges) offense while on release (2009 charges).

BREWER V. REES

- For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
- Art. 2, Section 22, Arizona Constitution
- Brewer argued that he was not on bail for the 2009 when he committed the 2010 offense because the prosecution was "suspended."

BREWER V. REES

- Court held that whether TASC is ongoing or vacated is irrelevant.
- Charges were not dismissed. Rather, Rule 8 time limits were waived.
- "[S]uspension of prosecution, even where ultimate dismissal is posited as a potential case outcome, is not dismissal of the charges without prejudice."

BREWER V. REES

- What about A.R.S. section 13-708(d)?
- "A person who is convicted of committing any felony offense that is committed while the person is released on bond or on the person's own recognizance on a separate felony offense . . . shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while on release."